

To: Giles-AA, Cynthia[Giles-AA.Cynthia@epa.gov]
From: Rader, Cliff
Sent: Tue 3/12/2013 1:30:23 PM
Subject: RE: FYI - Limited Scope of Analysis - Corps NEPA for KCH

YES!

From: Giles-AA, Cynthia
Sent: Tuesday, March 12, 2013 9:01 AM
To: Rader, Cliff
Subject: RE: FYI - Limited Scope of Analysis - Corps NEPA for KCH

Can you come down 10 minutes before so we can talk for a minute before the meeting?

From: Rader, Cliff
Sent: Tuesday, March 12, 2013 8:58 AM
To: Giles-AA, Cynthia; Chester, Steven
Cc: Bromm, Susan
Subject: FYI - Limited Scope of Analysis - Corps NEPA for KCH

Just saw this in the preliminary Draft EIS for KCH....see bolded language

4.1.1 Corps Scope of Analysis

The WVDEP evaluated the impacts of the Buffalo Mountain Surface Mine during the SMCRA permit process in accordance with its regulations (WV Code § 22-3). Therefore, the majority of the information and data in this chapter were prepared for, submitted to, and reviewed by the WVDEP prior to issuance of SMCRA Permit S-5018-07 for the Buffalo Mountain Surface Mine.

The Corps is evaluating a CWA Section 404 Individual Permit (IP) application for the discharge of fill material into waters of the U.S. in conjunction with the construction and operation of the

Buffalo Mountain Surface Mine. The Corps' scope of analysis differs from the broader evaluation conducted by the WVDOH and the FHWA. While the FHWA and the WVDOH will conduct a comprehensive evaluation of the potential environmental, social, and economic consequences of the alternatives in accordance with NEPA and 23 USC § 109(h), **the Corps' NEPA scope of analysis is limited to the waters of the U.S. and the riparian areas (extending 60 feet from the top of the bank on each side of the stream) adjacent to those waters that are proposed to be filled by the construction of the valley fills and associated sediment basins and mine-through areas.** The Corps' scope of analysis is consistent with the U.S. Court of Appeals for the Fourth Circuit's (Circuit) February 13, 2009 opinion in *Ohio Valley Environmental Coalition v. USACE*, Nos. 07-1355, 07-1479, 07-1480, 07-1974, 17-2112 (4th Cir). The Circuit found the Corps' jurisdiction under CWA Section 404 is limited to the narrow issue of the filling of jurisdictional waters. **Upland environmental effects are not within the Corps' "control and responsibility" because they are "not essentially a product of the USACE [Corps] action."** The Corps' scope of analysis under Section 7 of the *Endangered Species Act* and Section 106 of the *National Historic Preservation Act* will include the entire Buffalo Mountain Surface Mine SMCRA permit boundary.